available to the ordinary guardian of the peace. Thus the order of a superior officer will under certain conditions justify a homicide otherwise criminal.[10] And persons may be arrested and detained indefinitely during the existence of the disorder merely as a preventive measure, without criminal indictment or charge.[11] But it is one thing to hold that the existence of a state of extreme lawlessness and disorder brings such procedure within the meaning of due process of law, and quite another to recognize that because of such necessity, however great, the executive may, in the exercise of an uncontrolled discretion, entirely suspend the constitutional guaranty of trial by jury and subject the lives and liberties of citizens to the summary jurisdiction of military courts. Law enforcement as an end cannot justify a suspension of the most fundamental law. Where the local courts are open, such procedure does not seem essentially different from that condemned by the United States Supreme Court in a somewhat similar case,[12] but it is submitted that the Montana court is correct in holding that the availability of the local courts is immaterial. While necessity may authorize a great enlargement of executive power within its field, it is difficult to support such executive usurpation of judicial power expressly lodged in another department. Moreover there seems to be no necessity for the immediate trial of offenders who may be imprisoned until their cases can later be brought before the proper tribunal. Nor can the West Virginia procedure be justified under the laws of war, first because the laws of war are only applicable where a state of organized rebellion exists,[13] and second because the power to declare war is vested exclusively in the federal government.[14] The existence of martial rule is justified only by its necessity for the preservation of the peace. It is to restore and not to become a substitute for civil authority; and a practically unlimited power of arrest and detention seems to afford means amply sufficient to bring about this result without further violation of the supremacy of the civil over the military power.[15] The recent utterance of the Montana court affords a salutary answer to the subversive doctrine so recently enunciated in West Virginia.

STATUTORY DISCRIMINATIONS AGAINST NEGROES WITH REFERENCE TO PULLMAN CARS. — A new phase of the Jim Crow question has been presented by statutes which allow railroads to provide sleeping cars, chair

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[10] Commonwealth *v.* Shortall, 206 Pa. St. 165, 55 Atl. 952.

[11] *In re* Boyle, 6 Idaho 609, 57 Pac. 706; *In re* Moyer, 35 Colo. 159, 185 Pac. 190; Moyer *v.* Peabody, 212 U. S. 78.

[12] *Ex parte* Milligan, *supra*, where it was said that military trial in time of war could never be warranted in uninvaded domestic territory where civil courts were sitting.

[13] The distinction between mere riot or insurrection and organized rebellion which gives rise to a state of public war is clearly drawn in The Prize Cases, 2 Black (U. S.) 635, 672, 687.

[14] 2 WILLOUGHBY, THE CONSTITUTION, §§ 730, 714.

[15] COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 435; and see also a learned article on the subject of this note in 5 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 718.

cars, and dining cars for white passengers without supplying like cars for negroes.[1] In a recent case the United States Supreme Court intimated that such a statute is unconstitutional, even though it be shown that there is not a sufficient demand among negro passengers to warrant the providing of such accommodations for them. *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151.[2]

As a general proposition, any discrimination based on color, the result of state as distinguished from individual action, may, under the Fourteenth Amendment, be eradicated by the federal courts.[3] But the notion of just what constitutes discrimination at any given time is a variant chiefly determined by an equally unstable public opinion. At the close of the Civil War the prevalent idea regarded the mere segregation of the negro, in public conveyances, as discrimination. And this attitude was reflected in the courts.[4] Of later years, however, mere separation is not regarded as discrimination; accordingly, the so-called Jim Crow statutes, making compulsory the segregation of negro passengers in common carriers, are upheld.[5] The theory is that classification is not discrimination; [6] that equality before the law does not involve the right to occupy identical conveyances; [7] and that such statutes are reasonable police regulations designed for the mutual comfort and security of both races.[8] Regarded abstractly, the Jim Crow statutes do secure equality before the law. If the car reserved for white passengers is closed to negroes, the converse is likewise true. Yet it is questionable whether this kind of equality is that which the Fourteenth Amendment was intended to secure.[9] In practice, these classifications are always imposed by the white race; and the motive is admittedly the avoidance of the black race. Since this purpose is accomplished, the technical equality before the law held out to the negro partakes somewhat of the nature of a sop. Perhaps this is the best the law can do. On its face it promises equality, but it cannot change the feelings of the people.[10] At least the law can enforce this standard of apparent equality. Hence, if certain classes of one race are allowed to ride with the other, like exemptions must be made in regard to the other race.[11] Moreover, statutes allowing separate conveyances must require that these be equal in

[1] REV. LAWS, OKLA., 1910, §§ 860 *et seq.*; KIRBY'S DIGEST OF ARK. STAT., § 6625; 3 MCEACHIN TEX. CIV. STAT., ann. art. 6750.

[2] Mr. Chief Justice White, Mr. Justice Holmes, Mr. Justice Lamar, and Mr. Justice McReynolds impliedly dissent. For a statement of the case, see RECENT CASES, p. 425.

[3] See the Civil Rights Cases, 109 U. S. 3, 13.

[4] See Railroad *v.* Brown, 17 Wall. (U. S.) 445, 452. In some of the northern states this attitude continued for some years later. See Ferguson *v.* Gies, 82 Mich. 358, 363, 46 N. W. 718, 720 (separation in restaurant).

[5] Plessy *v.* Ferguson, 163 U. S. 537; Ohio Val. Ry.'s Receiver *v.* Lander, 104 Ky. 431, 47 S. W. 344, aff'd 882; Morrison *v.* State, 116 Tenn. 534, 95 S. W. 494; Logwood *v.* Memphis & C. R. Co., 23 Fed. 318.

[6] See Morrison *v.* State, *supra*, p. 546.

[7] See Logwood *v.* Memphis & C. R. Co., *supra*, p. 319.

[8] See Ohio Val. Ry.'s Receiver *v.* Lander, *supra*, p. 444. See Gaines *v.* Seaboard Air Line Ry., 16 I. C. C. 471, 473.

[9] See Sec. 1 of the Civil Rights Bill of 1875, 18 U. S. STAT. AT L., 335. See Harlan's dissent in Plessy *v.* Ferguson, *supra*, p. 557.

[10] See West Chester & Philadelphia R. Co. *v.* Miles, 55 Pa. St. 209, 213.

[11] State *v.* Patterson, 50 Fla. 127, 39 So. 398 (statute exempting negro nurses in charge of white children held unconstitutional).

all points of comfort and convenience.[12] The same principles appear applicable to Pullman and other sleeping cars, for if these luxuries are provided, they are open to all passengers without discrimination as much as ordinary coaches.[13] In the recent case before the United States Supreme Court, the argument in favor of the statute was based upon the comparatively negligible demand for Pullman accommodations by negro passengers. But the demand which such cars are installed to meet is created by the traveling public. If the demand is sufficient to warrant the furnishing of Pullmans at all, to exclude however minute a portion of that public simply because of color seems to be sheer discrimination. The *dictum* of the majority in the principal case therefore appears correct.

If then these statutes are unconstitutional, it would seem that a practical problem of some difficulty faces those states which desire segregation of the races in Pullmans. To require the railroad to duplicate its Pullman accommodations in the face of a considerable financial loss, because of the little or no demand for "black" Pullmans, although a considerable white patronage existed, would savor strongly of a deprivation of property without due process of law.[14] So if the Jim Crow laws apply to Pullmans, the railroad would seem justified in refusing such service until the demand was sufficiently great to make feasible the installation of separate cars at at least a nominal profit. But in many cases the whites would then not be properly accommodated, and the railroad would be losing profits which the traffic was willing to pay. Thus the railroads may be induced to offer a practical solution of the difficulty by partitioning off for negroes a portion of the same Pullman coach sufficient to meet what small negro demand arises. Even if segregation laws are not applied to Pullmans, if we assume a public opinion which finds expression in such statutes, the railroads' problem is still to segregate the negro or lose entirely its white patronage. It seems, therefore, that although the situation may be handled by statute, a desire for the profits of this white patronage would be a sufficient incentive to cause the southern railroads on their own initiative to devise, even more effectively, ways and means for a practical solution.[15]

THE INTERSTATE COMMERCE COMMISSION'S ANNUAL REPORT. — The dramatic conflict of large economic forces centering in the recent

[12] *Cf.* Murphy *v.* Western & A. R. R. 23 Fed. 637, 639; Gray *v.* Cincinnati Southern R. Co., 11 Fed. 683, 686.

[13] Nevin *v.* Pullman Palace-Car Co., 106 Ill. 222; see Pullman Palace-Car Co. *v.* Lawrence, 74 Miss. 782, 802, 22 So. 53, 57.

[14] See Smyth *v.* Ames, 169 U. S. 466, 526.

[15] A complication not directly presented by the principal case is the application of the interstate commerce clause to Jim Crow statutes. This question is usually avoided, as it was here, by construing the statutes as including intrastate passengers only. Louisville, N. O. & T. Ry. *v.* State, 66 Miss. 662, 6 So. 203; Chesapeake & O. Ry. *v.* Kentucky, 179 U. S. 388. But the recent decision in the Shreveport Rate Cases, 234 U. S. 342, 28 HARV. L. REV. 34, 294, would seem to have a bearing on the question. If the negro traveling to A., which is across the state line, is exempted from the Jim Crow statutes, may he not prefer A., as a trading center, to B., which is within the state? Thus, though only a regulation of intrastate travel, it might well interfere with interstate regulations.